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No. 87-1935

In the Supreme Court of the United States

OCTOBER TERM, 1987

GIROLAMO VITO PALAZZOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence recorded telephone conversations that were seized pursuant to court order.

1. On April 30, 1984, petitioner was charged together with three co-defendants in one count of a three-count indictment returned in the United States District Court for the Eastern District of Michigan. The indictment charged petitioner with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Two of his co-defendants were also charged separately with possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1). Before trial, petitioner and his co-defendants moved to suppress the evidence that was derived from court-authorized electronic surveillance of various telephones (Pet. App. A10, A62, A74).

On September 13, 1985, the district court granted the motion in part, finding that the affidavit in support of the

electronic surveillance order did not contain probable cause to support the wiretap of co-defendant Salvatore Evola's telephone and that the wiretaps of petitioner's telephones were tainted by the Evola wiretap (Pet. App. A10-A44, A62-A74). The district court also found that the affidavit for the Evola wiretap did not meet the necessity requirement of 18 U.S.C. 2518(1)(c), because it failed to show that other investigative techniques would be unsuccessful (Pet. App. A44-A58).

The court of appeals reversed, holding that the electronic surveillance order complied with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518 (Pet. App. A92-A114). Relying on the totality of circumstances test of *Illinois* v. *Gates*, 462 U.S. 213 (1983), the court of appeals concluded that the warrant was supported by probable cause. The court also ruled that the affidavit for the warrant contained an adequate statement of the reasons why resort to electronic surveillance was necessary.

2. Petitioner contends (Pet. 13-21) that the court of appeals used an erroneous standard in finding probable cause. He claims that an electronic surveillance order issued under 18 U.S.C. 2518 must satisfy the standard of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), rather than the test of *Illinois* v. *Gates*, *supra*. Petitioner also contends (Pet. 21-26) that the affidavit in this case merely used boilerplate language and therefore failed to fulfill the "necessity" requirement set forth in 18 U.S.C. 2518(1)(c).

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and

his conviction is affirmed on appeal, he will then be able to present his current contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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